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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 475th MEETING

Held at Headquarters, New York,
on Friday, 8 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. Mr. CRAWFORD (Canada) said that his delegation was in favour of retaining article 18 of the draft Model Law on International Credit Transfers (A/46/17, annex I), because it was useful to have a rule on conflict of laws. The first sentence of article 18 (1) confirmed the Parties' autonomy with respect to issues affecting payment, while the second sentence provided a good default rule in the absence of the exercise of such autonomy. The Commission should not decided to delete article 18 merely because the conflict-of-laws rule might not be the best possible rule for credit transfers.

2. Mr. BURMAN (United States of America) said that his delegation supported the statement of the representative of Canada. Article 18 provided the kind of guidance that made commercial transactions work better than did the absence of a rule on conflict of laws. The article would provide a workable solution for countries that adopted the Model Law, and would provide all parties that did not otherwise choose their applicable law under the first sentence of article 18 (1) with a rule to fall back on.

3. Mr. GREGORY (United Kingdom) said that his delegation did not share the views expressed in the note prepared by the Hague Conference on Private International Law, which drew attention to a number of difficulties concerning article 18. The Hague Conference maintained that it was not possible to include a conflict-of-laws rule in a substantive law, particularly a rule that determined whether or not the Model Law itself applied. However, that was not what article 18 purported to do. A country that had adopted the Model Law with article 18 in it would apply the conflict-of-laws rule when a situation described in that rule arose. The Hague Conference maintained that it made no sense to consider only the separate segments of a credit transfer, and that it was necessary to consider the credit transfer as a whole. Nevertheless, that was not a reason for dismissing the rule entirely. A credit transfer was a series of separate operations involving individual parties - senders and recipients of payment orders - between whom a dispute might arise. In analysing a credit transfer, it was possible to consider the obligations of a party in respect of a payment order or a particular segment of the credit transfer, and to determine which law applied.

4. If all countries adopted the Model Law, there would be no need for a conflict-of-laws rule. The rule was necessary because some countries might not adopt the Model Law, while others might adopt it with variations. Moreover, a credit transfer might pass through a number of countries whose laws were different. It was necessary to include in the Model Law some statement to the effect that rules should apply only where all parties were subject to them, either under their relevant law or by agreement. However,

(Mr. Gregory, United Kingdom)

the Law would not work unless all participants in credit transfers were subject to it. Perhaps the Secretary of the Commission could provide some guidance in that respect.

5. Mr. HERRMANN (Secretary of the Commission) said that article 18 was a conflict-of-laws rule and was not designed to determine the territorial sphere of application of the Model Law in any other way. The rule applied only to a dispute in a State that had adopted article 18, and had no bearing on whether the States to which the rule referred had adopted the Model Law or not. If the rule referred to a State that had adopted the Model Law, it would then be necessary to determine whether the transaction involved an international credit transfer, in which case the Model Law would apply; otherwise, the existing national law, if any, would apply. In accordance with article 1 (1), the question of sphere of application would arise only when reference was made to the State whose law would apply.

6. The conflict-of-laws rule provided a single law that was applicable to the entire international credit transfer. If it was realistic to expect States and their banks to agree to a single, uniform law, and to expect that the law of the State of the receiving bank would apply, that would mean that the Model Law would apply only in States that adopted it. A dispute taken to a court in one of the States parties could be settled easily. However, a problem might arise with a bank other than the beneficiary's bank. If a State had adopted the Model Law and that Law was applicable, there would be no need for a uniform system.

7. Consideration should be given to whether or not a State would be willing to accept the substantive unitary system provided by the Model Law and, in addition, a convention on the applicable law, which was currently being prepared by the Hague Conference. It might be preferable to have separate instruments in cases where a State had objections to adopting the unitary system but, in the area of conflicts, wished to become a party to a convention on the applicable law.

8. Mr. CHATURVEDI (India) said that his delegation supported the views expressed by the representatives of the United States and Canada regarding the desirability of retaining article 18.

9. Mrs. FERNANDEZ DE GURMENDI (Argentina) said that her delegation had considered the arguments adduced by the Hague Conference in its note, and wished to join those delegations that were in favour of deleting article 18. While a rule on conflict of laws was necessary, the Commission should endeavour to adopt a rule that would satisfy all parties concerned. It might therefore be better to wait three or four years until the Hague Conference had completed its convention on the applicable law.

10. Mr. SANDOVAL (Chile) said that his delegation was in favour of deleting article 18 in its entirety.

11. Mr. LOJENDIO (Spain) said that his delegation was in favour of retaining article 18. A decision to wait until another organization prepared a conflict-of-law rule would considerably delay the adoption of the Model Law. Moreover, while the Hague Conference made significant contributions to private international law, it lacked the universality of the United Nations.

12. The arguments for deleting article 18 were based on objections to the subsidiary rule, not to the main rule that provided that the parties were free to choose the law governing the rights and obligations arising out of a payment order. The subsidiary rule, which involved the application of the law of the State of the receiving bank, would apply only in the absence of agreement.

13. His delegation wished to know the precise reasons why some delegations considered the rule in article 18 to be invalid with respect to electronic transfers.

14. Some delegations favoured a single law that would apply to the entire credit transfer. However, it was quite possible that the parties involved in each segment of the transfer might choose a law that was different from the law chosen by the parties in the previous or subsequent segment. Those who defended the theory of the single law could not contend that the free choice of different laws would be restricted by the principle of the single law. If a problem were to arise in a single segment of the transfer, he did not understand why it would have to be resolved according to a law that was not directly applicable to the segment. More important than the single law itself was the proximity between a segment and the law that governed it; in that respect, article 18 satisfied that requirement.

15. Mr. KOMAROV (Russian Federation) said that his delegation supported the retention of article 18. In addition to the arguments already put forward in favour of retention, he would point out that the provisions of article 18 should be regarded not as an attempt to resolve questions of conflict of laws in credit transfers in general, but as a supplemental rule which could help to unify the substantive rules of the Model Law itself. From that point of view, the provision was the logical culmination of the effort of unification embodied in the draft Model Law. Moreover, even if the Model Law were to be adopted by all States, the provision would not automatically obviate all conflicts of laws, because the Model Law did not attempt to regulate all situations; that was true even in the case of parties in countries which had codified their rules concerning credit transfers. The provision should therefore be regarded as a general indication to countries of the need to take a more flexible approach to the question of conflicts of laws.

16. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that, in connection with the remarks made by the Secretary of the Commission, he wished to make it clear that there was no competition between his organization and the Commission, but only cooperation.

17. In clarification of his own view, he added that what he had said at an earlier meeting was that a Model Law without rules of autonomous application in particular cases could be implemented only through the use of a conflict-of-laws system. With respect to how the Model Law could be made applicable to the entire transaction, he would reply that that could only be done either by the adoption of a convention containing rules governing the entire transaction, or by the inclusion in the Model Law of a rule governing conflict of laws. Of course, a convention would require enforcement in the sense of ratification and incorporation into national legal systems, but if the Hague Conference drew up such a convention and States approved of it, they would then of course proceed to ratify and adopt it.

18. With respect to the comment that article 18 established a degree of certainty on the question, he would reply that, on the contrary, article 18 provided no certainty. For example, in the hypothetical case of a credit transfer from Salzburg to Cleveland, Ohio, via Vienna and New York on which litigation subsequently arose in London, a judge would find no certainty in the provision, because he would be unable to establish in which intermediate segment of the transaction any particular event had taken place.

19. With respect to the comment that the rule of autonomy was a good one and should be retained, he would add that it also created great problems. For example, if, in the hypothetical case he had referred to, the New York segment of the transaction involved on electronic transfer under the CHIPS system, all segments of the transaction would automatically be subject to New York law under the legislation of that State. His point was that if the rule on conflict of laws was retained as it stood in article 18, it would create many more problems than it would resolve.

20. The CHAIRMAN asked the observer for the Hague Conference how the hypothetical problem he had given as an example would be resolved under the Rome Convention.

21. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the Rome Convention would not, in his opinion, offer a good solution to the problem, as it consisted of a set of general contractual rules. In dealing with international credit-transfer questions, a more detailed set of rules than those provided by that Convention would be required.

22. Mr. BISCHOFF (Observer for Switzerland) said that he favoured the deletion of article 18 in its entirety, for the reasons given by the observer for the Hague Conference.

23. Mr. BHALA (United States of America) said that the work of both the Hague Conference and the Commission was valuable. There seemed no need to try to decide which was the more appropriate body to deal with questions of conflict of laws.

24. It seemed to him that the observer for the Hague Conference had demonstrated the potential usefulness of article 18, as he had given an example of a hypothetical conflict of laws arising out of a credit transfer and then proceeded to solve the problems involved through the application of the Model Law. His delegation did not maintain that segmentation in itself was a good thing; its preference would be, rather, for an end-to-end system. But the only way to achieve such a system was either by universal adoption of the Model Law, which was unlikely, or for the parties to a credit transfer to agree that the Model Law applied, which was possible as a practical matter. A similar approach had been adopted in United States federal jurisprudence to deal with a similar situation, and had provided some certainty. The point was that a beginning had to be made somewhere.

25. Mr. ROJANAPHAUK (Thailand) said that if a convention on conflict of laws was adopted, its provisions would govern such questions - but no such convention was as yet in existence. In any case, the Model Law could include provisions with respect to conflict of laws which might be useful. It was indeed necessary to have some applicable rule providing certainty on the question. Moreover, the first sentence of article 18 (1), which left choice of the applicable law to the parties, should alleviate the concerns of those not in favour of the second sentence.

The meeting was suspended at 11.30 a.m. and resumed at noon.

26. Mr. LIM (Singapore) said that he felt sympathetic towards those who considered that article 18 provided a degree of certainty, but he was afraid that it was more ambiguous than the existing rules on conflict of laws, which the Commission should not attempt to modify without sufficient consideration.

27. For article 18 to apply, all relevant States would have to have adopted the Model Law. If that were not the case, article 18 would apply only if the Model Law were the applicable law, which would have to be determined by the rules on conflict of laws. The problem was circular, and article 18 seemed of limited usefulness.

28. Mr. MONTES DE OCA (Mexico) said that having heard the arguments for and against article 18, he was in favour of its retention.

29. Mr. EL-SHARKAWY (Egypt) said that for the reasons which he and others had already stated, he was convinced that article 18 should be deleted. He did not propose to repeat all the reasons he had already given, but wished to add one further consideration. The Model Law would be applied by national courts. If a national court found the Model Law not to be applicable, then its provision on conflict of laws, article 18, would not be applicable either. If the Model Law's applicability or inapplicability was to be decided by the national courts, then there was no need for a rule on conflicts of laws.

30. Mrs. AUGIER (France) recalled that France had been in favour of deleting article 18. Having heard the arguments of the various representatives, in particular those who were in favour of retaining it, her delegation had concluded that the discussion had a dual nature. On the one hand, there was a question of private international law, and of the rule on conflict of laws. On the other hand, there was the issue of the underlying conception of the Model Law, which came down to the question of whether credit transfers were seen as a single operation running from the originator to the beneficiary, or as a series of separate segments. If consideration of article 18 did indeed make it necessary to re-examine the underlying conception of the Model Law, she proposed that article 18 should be removed from the Model Law and referred to a group of experts.

31. Mr. MOORE (Nigeria) said that particularly after listening to the views of the observer for the Hague Conference, he saw no reason to retain article 18.

32. Mr. DASTIS (Spain) said that he was in favour of retaining article 18. It might well be that the Hague Conference would deal with the issue in more detail at some time in the future, but it had to be asked when that future might be. Some of the Hague Conference's Conventions, although completed, were not yet in force.

33. Article 18 seemed fundamentally acceptable, and he urged that the Commission should retain it rather than put off to some uncertain future the resolution of the question of conflict of laws.

34. Mr. DE BOER (Observer for the Netherlands) said that he had found most convincing the argument of the observer for Finland that because of article 18, which was relatively minor, some countries might not accept the rest of the Model Law.

35. Mr. DRAGOS (Observer for Romania) stated that it was very important for a country such as Romania, which was currently undergoing the transition to a free-market economy, to be able to rely on a precise framework regulating international relationships. He supported retention of article 18, with one minor modification, namely that article 18 (1) should state that the article would apply as a subsidiary or complement to the national law of the receiving bank.

36. Mr. SONO (Observer, International Monetary Fund) said that if article 18 was to be retained, then there were still many points of disagreement to be resolved. If, on the other hand, the issues covered in article 18 were to be left to the Hague Conference, then any work which that body undertook on the question of conflict of laws would be of more general applicability than was necessary for the Commission's purposes. For those two reasons, he supported the proposal of the representative of France that a group of experts should resolve the question of article 18; representatives of the Hague Conference should be invited to participate in such a group.

37. The CHAIRMAN said that if the French proposal were to be accepted, the Model Law would end after article 17. The Commission would adopt an incomplete Model Law, the question of conflict of laws would be studied by a group of experts, and a provision on the issue might or might not be added to the Model Law at a later date.

38. Instead, he suggested that the provisions of article 18 shall be incorporated in a footnote to the Model Law. The footnote could specify that as the question of conflict of laws did not directly affect credit transfers, States might wish, but were not obliged, to adopt a rule such as that in article 18. That solution would allow States which felt a need for the provisions of article 18, to adopt the article, however imperfect. At the same time, it would satisfy those that did not wish its provisions to be included in the Model Law, and lastly, it would allow the Commission to continue its work and move on to other issues.

39. Mr. GREGORY (United Kingdom) agreed with the Chairman and with his reasons for not wishing to submit article 18 to a special group. He also agreed with the observer for IMF that the Hague Conference would take a wider view of the rules on conflict of laws than was necessary for the Commission's purpose of resolving disputes in the one very specific area of international credit transfers. Within that limited context, he felt that article 18 was highly effective.

40. He supported the Chairman's suggestion that article 18 should be incorporated in a footnote, for adoption or rejection by individual States as they saw fit.

41. Mr. DASTIS (Spain) also agreed with the Chairman's suggestion, but expressed a preference for an annex over a footnote. A footnote had to be at the foot of something, and there would be nothing in the text to which article 18 as a footnote, could be attached.

42. The CHAIRMAN said that, while he would prefer an annex, he had suggested a footnote for the sake of consistency in the draft Model Law.

43. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) suggested that the second sentence of article 18 (1) should be deleted and the first sentence, on which there was consensus, retained. In that way, the draft Model Law would both respect the principle of contractual freedom and contain a provision concerning conflict of laws.

44. The CHAIRMAN pointed out that many delegations were opposed to the deletion of the second sentence of article 18 (1). Moreover, it was not possible to split up a single provision in the manner suggested by the representative of the Islamic Republic of Iran.

45. Mr. GRIFFITH (Observer for Australia) agreed with the representative of Spain.

46. Paragraph (1) should not be split up, since a rule providing for situations in which there was no agreement between the parties was necessary in order to complete the structure of the proposed norm.

47. Mr. FUJISHITA (Japan) supported the idea of a footnote. The footnote should, however, state that the Commission had failed to achieve a consensus on the text of article 18 and that its application was optional.

48. The CHAIRMAN said that he had suggested a footnote precisely because it was desirable to avoid any reference in the Model Law to a lack of consensus.

49. Mr. BURMAN (United States of America) said that, while he had no objection to the use of a footnote, there was indeed consensus on the first sentence of article 18 (1). The two sentences of article 18 (1) dealt with different questions which might usefully have been separated in the Commission's discussions. The first sentence related to the choice of law and not to conflict of laws; it should be appended to article 3, concerning variation by agreement, while the provision of the second sentence might be included in a footnote to either article 1 or article 3.

50. He was not in favour of an annex, because it would create doubt in the minds of users concerning the relative importance of the provisions contained in the annex and in the footnotes respectively.

51. The CHAIRMAN urged members not to be sidetracked into a discussion of whether or not to retain the first sentence of article 18 (1), on which, moreover, the Commission had not reached a consensus. He hoped that the representative of Spain would not insist on the use of an annex.

52. Mr. ALVAREZ (Uruguay) supported the arguments of the representative of Spain in favour of an annex, which would also give more prominence to the provision it contained.

53. The CHAIRMAN said the fact that article 18 was unattached to any other provision in the draft Model Law was a minor detail. The Drafting Group would have enough resourcefulness to place the footnote at a logical point in the text.

54. Mr. RENGER (Germany) said that he would support either solution. He agreed with the representative of Japan that the footnote should include a statement that explained why the provision had been placed in a footnote.

55. The CHAIRMAN said that the footnote should contain a statement along the following lines: "The Commission felt that the provision on conflict of laws was directly related to the question of credit transfers. Countries may, however, decide whether they wish to accept the provisions of this article."

56. Mr. DASTIS (Spain) said that he would support the use of a footnote to article 1, as suggested by the representative of the United States.

57. The CHAIRMAN said he took it that the Commission wished to accept his suggestion for a footnote.

58. It was so decided.

59. Mr. BHALA (United States of America) said that the purpose of paragraph (2) was to serve as an exception to paragraph (1) in the case of interloper fraud, for example, where the sender sent a payment order in the name of an innocent customer. His delegation was opposed to paragraph (2) because it offered no guidance on the applicable law in cases of interloper fraud in which the actual and purported senders came under different jurisdictions. In contrast, paragraph (1) provided clear guidance, and the predictability which it offered would be lessened if paragraph (2) were retained.

60. The CHAIRMAN pointed out that the objective of article 18 (2) was limited to article 4 (1) and did not extend to article 4 in its entirety. Article 4 provided for situations in which a payment order was either authenticated or authorized. Where the payment order was authenticated according to the procedures provided in paragraph (2) of article 4, the same conflict-of-laws rule would apply as in the draft Model Law as a whole. Paragraph (1) referred to an exceptional situation in which there was authorization but not authentication. In such a case, the law of the State of the receiving bank would apply.

61. Mr. DE BOER (Observer for the Netherlands) observed that it might be possible for a country to accept only the conflict-of-laws rule and not the remainder of the Model Law.

62. Mr. HERRMANN (Secretary of the Commission) said that the provision on conflict of laws was important even if a country did not accept the Model Law. It should therefore be considered separately from the remainder of the text. Article 18 (1) sought to determine the domain of the applicable law, while article 18 (2) envisaged an exception. The issue which was the subject of the exception must be described, and not for the purposes of article 4 (1). In fact, one solution might be to delete the words "for the purposes of article 4 (1)" from paragraph (2) of article 18.

63. Mr. CHATURVEDI (India) said that paragraph (2) was related to paragraph (1) and should therefore be either deleted or similarly placed in a footnote.

64. The CHAIRMAN said that his suggestion was for the entire article to be placed in a footnote.

65. Mr. FUJISHITA (Japan) said that paragraph (2) should be retained as a footnote since it would be useful to provide conflict-of-laws rules for questions of agency.

66. Mr. GREGORY (United Kingdom), supported by Ms. KOSKELO (Observer for Finland), said that he shared the opinion of the Secretary of the Commission that the words "for the purposes of article 4 (1)" should be deleted from paragraph (2).

67. The CHAIRMAN said he took it that the Commission wished to delete those words and adopt article 18 (2), as amended.

68. It was so decided.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 476th MEETING

Held at Headquarters, New York,
on Friday, 8 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 18 (continued)

1. The CHAIRMAN said that paragraph (3) of article 18 was a provision that was commonly included in the general clauses of conventions that were applicable to States with various territorial jurisdictions. The Commission had already taken the position that branches and separate offices of a bank in different States were separate banks.

2. Mr. DASTIS (Spain) said that paragraph (3) (a) was too general; instead of referring to territorial units having "different rules of law", it should refer to different regulations in respect of credit transfers. In Spain there were territorial units which had different regulations in many areas of law but the same commercial law.

3. The CHAIRMAN pointed out that if the Commission amended paragraph (3) (a), it would be departing from the language normally used in conventions.

4. Mr. GREGORY (United Kingdom) said that since paragraph (3) began with the words "For the purposes of this article", the provision was relevant only where there was a conflict of laws. If the law relating to credit transfers was the same in two territorial units of a State, the provision did not apply. If the Spanish amendment was adopted, it would not be clear what the rules of law governing credit transfers were, since they would include both the provisions of the Model Law and also other rules of law that were relevant to credit transfers.

5. The CHAIRMAN suggested that the Drafting Group should consider the suggestion made by the representative of Spain.

Outstanding issues

6. The CHAIRMAN said that at its twenty-fourth session, the Commission had left three issues pending. The first issue, referred to in paragraph 84 of the report of that session (A/46/17), concerned the definition of the term "beneficiary's bank". It was his view that the Commission's discussions had shown that a definition was unnecessary. If he heard no objection, therefore, he would take it that that was the view of the Commission.

7. It was so decided.

8. Mr. CHATURVEDI (India) said his delegation felt that the absence of a definition of the term "beneficiary's bank" could create some problems, especially in relation to article 7 and other articles concerning the

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discharge of the obligation of the sender or the originator. The Commission should put it on record that problems could arise in respect of implementation.

9. The CHAIRMAN said that the second issue, referred to in paragraph 222 of the report, was the possible insertion of a general provision along the lines of article 7 (2) of the United Nations Convention on Contracts for the International Sale of Goods. The wording of the general provision would be:

> "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

The wording would be adjusted, as required.

10. Mr. BURMAN (United States of America) said his delegation felt that the general provision would work just as well in a model law as in a convention and would provide useful guidance for courts in producing decisions that would support the overall purpose of the Model Law.

11. Mr. DE BOER (Observer for the Netherlands) said that it was appropriate to include the general provision in the Model Law, since the Model Law could be applied by courts in the absence of statutory law.

12. Mr. PELICHET (Observer, The Hague Convention on Private International Law) disagreed that the proposed general provision had a place in the Model Law. The Model Law would always be applied as the law of any State that incorporated it into its system; if there were lacunae in the Model Law, they would be filled by national law.

13. Mr. HERRMANN (Secretary of the Commission) said that since the general provision was taken from a convention, it would have to be adjusted for the purposes of the Model Law. There was no need for a court to invoke a conflict-of-laws rule when considering matters governed by the Model Law but not expressly regulated by it. If a question was not expressly addressed in the Model Law, an attempt should be made to find an answer in the principles of the Model Law before referring to other parts of the national legal system.

14. Mr. CHATURVEDI (India) said that it was unnecessary to include the general provision in the Model Law: where there was a point of dispute, courts should look at the laws and judicial decisions of other countries, as was the general practice.

15. Mr. EL-SHARKAWY (Egypt) said that he supported the inclusion of the general provision in article 18.

16. Mr. LIM (Singapore) said that at the previous session he had opposed the inclusion of the general provision. However, since then he had studied the application of UNCITRAL arbitration law in various parts of the world and had concluded that a provision regarding interpretation would be very useful.

17. Mr. CRAWFORD (Canada) said that it was very difficult to make a last-minute change in article 18; the new provision could be interpreted in ways that were completely foreign to his own legal system and would give the Model Law a much broader scope of application.

18. The CHAIRMAN observed that the proposal had been made at the previous session.

19. Mr. GRIFFITH (Observer for Australia) said that, as the Commission had a satisfactory text, there was a danger in introducing a general provision at the last minute.

20. Mr. GREGORY (United Kingdom) suggested that the Commission should consider deleting the words after the phrase "on which it is based".

21. Mr. DE BOER (Observer for the Netherlands) suggested that the question should be referred to the Drafting Group.

Suggestions by the Secretariat for the final review of the draft Model Law (A/CN.9/SR.367)

22. Mr. BERGSTEN (Consultant to the Secretariat) briefly introduced document A/CN.9/SR.367, containing the Secretariat's suggestions for the final review. In general, the points raised in the document were either drafting matters or relatively minor policy questions, such as the definition of "banking day" in paragraph 22.

23. The CHAIRMAN suggested that such minor questions should be sent to the Drafting Group. The Commission might then proceed to consider substantive questions.

24. Mr. HARRIS (Observer, Commission of the European Communities) said that the value date, which had not yet been discussed as a general point, could not be considered a drafting point. The Chairman should seek the permission of the Commission before referring the matter to the Drafting Group.

25. Mr. BERGSTEN (Consultant to the Secretariat) suggested that the Commission might consider the problem of the applicability of article 10 to the beneficiary's bank. The definition of the term "execution", which was still enclosed in square brackets, also referred to the beneficiary's bank, but the latter term was not defined. The most significant aspect of paragraph (1) of article 10 was the deemed-acceptance rule, and a clear decision was needed on whether that rule did or did not apply to the beneficiary's bank.

26. Mr. GREGORY (United Kingdom) said that the rule applied to the beneficiary's bank. There was no need to define execution in the context of the beneficiary's bank; the text was correct as it stood. The definition of execution referred only to banks other than the beneficiary's bank, so "execution" had its ordinary meaning in paragraph (1) with respect to the beneficiary's bank.

27. It was legitimate to include the beneficiary's bank under paragraph (1), which meant that the beneficiary's bank was required to execute the payment order on the same day or the following day. Precise stipulations, however, should be left to the local law to determine. With regard to paragraphs (1 bis) and (1 ter), the Commission ought to consider when value was to be given by the beneficiary's bank.

28. Mr. BHALA (United States of America) said that the definition of "execution" in article 2 (1) should be retained without square brackets. With regard to the execution of a payment order by the beneficiary's bank, his delegation thought that such an order could be accepted, but not executed, by that bank. Accordingly, the word "executed" in article 9 (2) and (5), which dealt with the obligations of the beneficiary's bank, might better be changed to "accepted". It might also be advisable to delete the phrase "within the time required for execution under article 10" from article 9 (5), in which case the time required would be governed by local law.

29. Ms. KOSKELO (Observer for Finland) agreed that article 10 (1) was applicable to the beneficiary's bank. If the beneficiary's bank did not accept the payment order in accordance with the other rules of article 8 by crediting the beneficiary's account, it ought to be possible to determine when the beneficiary's bank should have acted. It was also necessary to know when the transaction had been completed for the purposes of article 16.

30. Mr. CHATURVEDI (India) said that his delegation supported the position of the United Kingdom with regard to article 10 (1), on the understanding that the text as revised by the Drafting Group would be circulated to the members of the Commission.

31. Mr. LE GUEN (France) pointed out that article 10 (1) as currently drafted stipulated that a receiving bank was required to execute a payment order. The definition of a receiving bank given in article 2 (g) did not exclude the beneficiary's bank, a fact which was clear from the wording of other provisions such as article 11 (5), which referred to "a receiving bank other than the beneficiary's bank". Since article 10 (1) did not specifically exclude the beneficiary's bank, it was clear that the provision must apply to that bank. He therefore fully agreed with the remarks made by the representative of the United Kingdom.

32. To adopt the text proposed by the Secretariat and delete the words in square brackets would radically change the paragraph in question. Consequently, the square brackets should be deleted and the words inside retained.

33. Mr. FELSENFELD (United States of America) said that the application of article 10 to the beneficiary's bank created an unwarranted inconsistency in the Model Law. Articles 8 and 9 already specified clearly what the beneficiary's bank was required to do, and it was neither necessary nor appropriate to apply article 10, which referred to "execution", a term totally inapposite with regard to the beneficiary's bank.

34. Mr. CRAWFORD (Canada) said that he would agree with the remarks made by the representative of the United States of America if he could be fully satisfied that there was a duty on the beneficiary's bank to accept or reject the payment order within a specified period of time. One of the main objectives of the Commission's work was to improve the response of the international banking system, and it was essential that there should be a clear duty on banks to react upon receipt of a payment order. However, the Secretariat's proposal to delete the concept of deemed acceptance would create a disturbing situation where, although the funds were in the beneficiary's bank, the bank had no duty to act. If article 10 was not applied to the beneficiary's bank, the efforts to ensure a timely response by all banks participating in the transfer would be in jeopardy.

35. Mr. JONES (United Kingdom) agreed that it was essential that the beneficiary's bank should have a duty to act. With regard to the term "execution", the definition contained in article 2 of the Model Law referred specifically to receiving banks other than the beneficiary's bank. The question of execution in relation to the beneficiary's bank should be dealt with in accordance with local law, particularly as the Commission had already agreed that the relationship between the beneficiary's bank and the beneficiary fell outside the terms of the Model Law.

36. Mr. SONO (Observer, International Monetary Fund) said that the Working Group had left the term "execution" in square brackets throughout the text because it had not been sure whether the term should apply to the beneficiary's bank. It had been agreed that article 2 (1) could be deleted if, after discussion of articles 8 and 10, it was found that there was no problem in using the term "execution" in relation to the beneficiary's bank. However, some uncertainty had remained in the Drafting Group, and it had been decided to retain the square brackets. Nevertheless, in using the term "execution" in the discussion of articles 8 and 10, the Drafting Group had been aware that the term applied also to the beneficiary's bank, in that the latter was also a receiving bank. To attempt to discuss at the present stage whether or not article 10 (1) was applicable to the beneficiary's bank was therefore tantamount to reopening an issue which had already been decided.

37. The CHAIRMAN said that the most appropriate solution would be to remove the square brackets, since they did not correspond to any decision taken by the Commission.

38. Mr. BERGSTEN (Consultant to the Secretariat) drew attention to paragraphs (1 bis) and (1 ter) and said that they should be considered together, as they dealt with the same problem - namely the question of the day as of which a bank must give value to its credit party. Paragraph (1 ter) was quite clearly a deemed-acceptance situation and provided a specific rule governing the value date for a credit party other than the beneficiary's bank. It had not been extended to apply to the beneficiary's bank because it had not been thought appropriate to specify a value date to the beneficiary. Paragraph (1 bis) did apply to the beneficiary's bank, because it was dependent on paragraph (1).

39. However, if paragraph (1 ter) was not to apply to the beneficiary's bank, then neither should paragraph (1 bis). He did not understand why one value-date rule should apply to the beneficiary's bank and the other should not.

40. Mrs. FLINT (United Kingdom), supported by Mr. FELSENFELD (United States of America), said that neither paragraph (1 bis) nor paragraph (1 ter) should apply to the beneficiary's bank.

41. Mr. CHATURVEDI (India) said that paragraphs (1 bis) and (1 ter) should apply to the beneficiary's bank.

42. The CHAIRMAN said that to apply the paragraphs in question to the beneficiary's bank would clearly run counter to the policy adopted by the Working Group and the Commission throughout the drafting of the Model Law.

43. Mr. SCHNEIDER (Germany) said that for his delegation it was clear that paragraphs (1) and (1 bis) did apply to the beneficiary's bank. He was surprised that the Commission should be reopening policy discussions at the current stage.

44. Mr. BERGSTEN (Consultant to the Secretariat) said that, according to the decisions taken, paragraphs (1) and (1 bis) applied to the beneficiary's bank but paragraph (1 ter) did not. The scope of paragraph (2) was clear, since it referred to articles 7 and 9, and paragraphs (4), (5) and (6) should fall into place without any need for discussion.

45. Mr. GREGORY (United Kingdom) questioned the advisability of allowing the inconsistency between paragraphs (1 bis) and (1 ter) to remain. He was not convinced that a policy decision had been taken at the previous session.

46. Mr. DE BOER (Observer for the Netherlands) said that paragraphs (1 bis) and (1 ter) could either both apply to the beneficiary's bank or both exclude it, but to leave the discrepancy between them was very peculiar.

47. Mr. BERGSTEN (Consultant to the Secretariat) said that the problem of time-limits within the context of deemed acceptance was a difficult one, and the Secretariat had not attempted to put forward a solution. Nevertheless, a simple drafting change might resolve the problem, and that was to delete the

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deemed-acceptance rule and rely on the definition of payment contained in article 5. However, he recognized that a policy change was implied which might not be acceptable to some delegations.

48. Mr. GREGORY (United Kingdom) said that the proposal raised substantive questions of policy which could not be discussed at the current stage. In any case, such a radical solution was not really necessary: the current provisions were unsatisfactory only in terms of their drafting and not in the way in which the substantive rules operated. He felt that the Commission could recognize that a problem existed but agree not to address it.

49. Mr. BHALA (United States of America) said that he agreed with the remarks made by the Consultant to the Secretariat. However, although he understood the reasons for wanting to delete the deemed-acceptance rule, it was rather late for such a radical amendment of the text. In order to achieve the same goal, it might be possible to delete articles 6 (2) (e) and 8 (1) (h), and either amend article 8 (1) (c) or insert a new article 8 (1) (h) reading "when the beneficiary's bank has been paid by its sender". While some delegations might then wonder whether article 6 (3) and article 8 (2) should not also be deleted, those provisions should be retained because they obliged the receiving bank to give notice of rejection.

50. Mr. CHATURVEDI (India) agreed with the Consultant to the Secretariat that the concept of deemed acceptance should be deleted. However, the questions concerned were substantive ones and should not be left to the Drafting Group.

51. Mr. LE GUEN (France) said that, if his understanding was correct, the United States was proposing to replace deemed acceptance with payment, since payment was deemed to have been accepted by a receiving bank when it was received. Under article 5, however, payment did not depend on action by the receiving bank, but took place on the initiative of the sending bank. While acceptance usually required an action by the party receiving payment, the concept of deemed acceptance implied that acceptance resulted from non-action by the receiving bank. That would seriously undermine the concept of acceptance, which was crucial to the Model Law.

52. Mr. BERGSTEN (Consultant to the Secretariat) said that, under the United States proposal, there was only one situation in which a receiving bank would not have an opportunity to reject a payment prior to receiving it and thus accepting it: namely, when it received credit with a central bank. Under article 5 (b) (iv), if a bank received a payment order during the day and wished to reject it, it could do so until such time as there was settlement of the net amount, usually at the close of the business day.

53. Mr. SCHNEIDER (Germany) said that, as his delegation attached importance to the principle that a bank should have the opportunity to reject a payment order, it opposed the United States proposal and supported the statement made by the representative of France.

54. The CHAIRMAN said that it was improper to reopen debate on an issue on which the Commission had already taken a decision; accordingly, he suggested that the text should remain as it stood.

55. Mr. LE GUEN (France), referring to the question of the automatic conversions of currencies by receiving banks in implementing credit transfers, said his delegation had supported a proposal at the twenty-fourth session to add to article 7 (2) a provision requiring the receiving bank to execute the transfer in the currency stipulated by the sender. That proposal had been rejected on the grounds that protection against the practice of automatically converting currencies was already implicit in the wording of that paragraph. The issue, however, was of great importance in Europe, where there were plans to adopt a single European currency. In the future, banks might be required to convert payment orders into, for example, both French francs and European Currency Units (ECUs). In such cases, banks should be given the option of rejecting a payment order.

56. Mr. HARRIS (Observer, Commission of the European Communities) said that the current discussion was similar to the one which had arisen in the context of article 17 (2), where there was a possibility that a beneficiary might receive an amount less than the amount indicated in the payment order. UNCITRAL had dealt with that issue by deciding that the payment order would none the less be deemed to be complete. Banks did, in fact, make currency conversions, and it was important to avoid laying down a rigid rule on the subject. Originators sometimes specified in their payment orders that the conversion was to be made by their bank or by an intermediary bank farther down the chain; on the other hand, banks were sometimes required to make that decision. In any case, the Commission of the European Communities preferred for the matter to be dealt with as part of a rule governing the manner in which the payment order issued was made consistent with the payment order received.

57. Mr. CHATURVEDI (India) said his delegation felt that the payment order should be accepted and executed in the currency specified by the originator.

58. Mr. LE GUEN (France) proposed that the following phrase should be inserted in article 7 (2) after the words "in an appropriate manner": "and in the currency stipulated in the payment order received by the receiving bank".

59. Mr. OPAGOS (Observer for Romania) proposed that the following clause should be inserted after the second sentence of article 18 (1): "However, the law of the State of the receiving bank shall be of secondary or lesser application, and shall apply only in order to supplement the Model Law where and to the extent that the law of the State of the receiving bank shall be the most favourable to the beneficiary of the transfer".

60. The CHAIRMAN recalled that the Commission had decided to include article 18 in a footnote.

61. Mr. BURMAN (United States of America) said that, as the Commission had decided at its previous session that the rules governing the revocation of a payment order would apply also to the amendment of a payment order (article 11 (8 bis)), the Commission should add similar wording to articles 2 (j) and 4 (1) and (2) for the sake of consistency.

62. Mr. CRAWFORD (Canada) said that the proposal should be referred to the Drafting Group.

63. Mr. GREGORY (United Kingdom) said that in principle, he agreed with the Canadian representative.

64. Mr. CHATURVEDI (India) sought assurance that the proposal did not involve any substantive changes in the text.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the United States proposal to the Drafting Group.

66. It was so decided.

67. Mr. FUJISHITA (Japan) said that he wished to place on record his delegation's concern at the provision in article 4 (2) which excluded an authentication procedure commonly applied in his country, namely, the comparison of a signature and a seal. His delegation believed that the national law of each State should apply with regard to authentication procedures.

The meeting rose at 6 p.m.